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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92055558
Party	Plaintiff Economy Rent-A-Car, Inc.
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Attachments	Petitioner's Opposition to Combined Motion to Compel Discovery.PDF(3210472 bytes) Petitioner's Exhibits 1-6.PDF(2326905 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

ECONOMY RENT-A-CAR, INC. Petitioner, **v.** **EMMANOUIL KOKOLOGIANNIS AND SONS, SOCIETE ANONYME OF TRADE, HOTELS AND TOURISM S.A.** Respondent.	**Cancellation No. 92055558** **Registration No. 3256667**

PETITIONER ECONOMY RENT-A-CAR, INC.'S OPPOSITION TO RESPONDENT'S COMBINED MOTION TO COMPEL DISCOVERY AND LEAVE TO SERVE ADDITIONAL INTERROGATORIES

INTRODUCTION

Petitioner Economy Rent-A-Car, Inc. hereby sets forth its Brief in opposition to Respondent's "Motion To Compel Answers To Interrogatories And Production Of Documents, And Motion For Leave To Serve Additional Interrogatories Exceeding The Limit" in the above-styled proceeding. For the reasons and arguments set forth below, Petitioner, through its undersigned counsel, respectfully requests the Trademark Trial and Appeal Board ("TTAB") to deny Respondent's combined motion in its entirety.

Respondent's motion is somewhat confusing in its contentions, mostly consisting of irrelevant comments that have little or nothing to do with the motion(s) actually before the TTAB. As best as Petitioner can determine, Respondent seeks answers to its fourth set of interrogatories, a supplemental answer to its Interrogatory No. 18, and a more

complete response to its Document Request No. 36. Moreover, Respondent's request for answers to the fourth set of interrogatories seems to be premised on an implied assertion that it has demonstrated "good cause" to exceed the numerical limitations imposed by 37 CFR §2.120(d)(1).

Although Respondent has requested the TTAB to order Petitioner to answer interrogatories and a document request, it provided the TTAB with no factual basis for the motion and failed to cite a single case in support of its position. Instead, Respondent has focused most of its attention on complaining about Petitioner's Petition For Cancellation in this case, arguing essentially that the pleading left Respondent confused as to the facts pled. It then bootstraps its request for leave to serve additional interrogatories on that alleged confusion, even though it did not seek leave from the TTAB before serving its "fourth set" of interrogatories (which prompted Petitioner's General Objection in this proceeding).[1]

While virtually all of Respondent's arguments are aimed at convincing the TTAB that Respondent should be given leave to serve interrogatories exceeding the numerical limits imposed under 37 CFR §2.120(d)(1),[2] Petitioner will nevertheless address the initial issue of whether Respondent four sets of interrogatories did, in fact, exceed those limits (when considering their discrete subparts). Petitioner will then respond to the secondary issue of whether the limits should be overlooked in this case based on

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[1] Respondent also rejected Petitioner's offer to stipulate to allowing both parties a limited number of additional interrogatories, presumably because it did not want to grant Petitioner the same right to exceed the set numerical interrogatory limits that Respondent was seeking (and now seeks).

[2] At no time does Respondent make an effort to even address whether it exceeded the numerical limits for interrogatories under 37 CFR §2.120(d)(1). Ignoring the plain recommendation of Section 405.03(e) of the Trademark Trial and Appeal Board Manual of Procedure, Respondent provides the TTAB with no calculation of the number of interrogatories (and discrete subparts) it has served in its four sets of interrogatories and, in fact, appears to conced/accept Petitioner's position that the limits were exceeded.

Respondent's arguments. Finally, Petitioner will also address whether Respondent has met its burden of proof in demonstrating that Petitioner should somehow be ordered to produce information and documents that are not in its possession, custody and control (a fact that was repeatedly brought to Respondent's attention).

As demonstrated below, Respondent's motion, filed only a few before Petitioner was to begin taking its Trial Testimony depositions in this case, lacks any factual and legal support. Contrary to Respondent's claims, it has been provided with full and complete responses to all of its discovery requests and its frivolous arguments that it was somehow misled by those responses in this case are nothing short of specious.

STATEMENT OF FACTS

On April 26, 2013 and prior to serving a fourth set of written interrogatories in this case, counsel for Respondent wrote to Petitioner's counsel inquiring about the number of interrogatories that had already been served in connection with Respondent's first three sets of interrogatories, stating: "We are concerned that the interrogatories we are preparing to serve on behalf of our client will again result in your client's general objection that they exceed the limit of 75".[3] See **Exhibit 1.** In addition, Respondent also requested an explanation as to how Petitioner arrived at the number of interrogatories it calculated in connection with Respondent's previously-served three sets of written interrogatories (see Respondent's Exhibit C). Petitioner's counsel, on April 26, 2013, initially responded by proposing the following stipulation: "each party

[3] Respondent's original set of interrogatories in this case contained an excessive number of interrogatories when counting their discrete subparts. That resulted in a General Objection from Petitioner. Respondent then withdrew the objectionable set of interrogatories in its entirety and re-served a "new" first set of interrogatories (which are now set forth in Exhibit C to Respondent's present motion).

may serve 'X' number of interrogatories (counting subparts) before the discovery deadline" (see **Exhibit 2**). Counsel for Respondent rejected Petitioner's aforesaid offer to stipulate to any increase in the number of interrogatories. See **Exhibit 3.**

Petitioner, on April 29, 2013, advised Respondent that it believed the latter had exceeded the permissible number of interrogatories (counting subparts) in its first three sets of interrogatory requests and further explained how it had reached that conclusion (see **Exhibit 4**). Petitioner again offered to stipulate to an increased number of interrogatories (i.e., ten additional interrogatories) that each party could serve in this proceeding. Again, counsel for Respondent declined Petitioner's aforesaid offer to stipulate to any increase in the number of interrogatories.

On May 7, 2013, Respondent then served its Fourth Set of Written Interrogatories (see Respondent's Exhibit C) and Petitioner timely asserted its General Objection to that discovery on June 7, 2013 (see Respondent's Exhibit D).

During the course of discovery, Respondent has also served multiple separate sets of Admission Requests and Document Requests on Petitioner—and the particular Document Request now at issue herein is shown at Respondent's Exhibit E.[4] Petitioner timely responded to each of those discovery requests, as well as all other discovery propounded by Respondent.[5]

Petitioner's position with regard to the above-noted interrogatories, as well as the other discovery requests propounded by Respondent now at issue herein, was set forth

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[4] Respondent has incorrectly recited Interrogatory No. 18 in Exhibit E (see the correct interrogatory in Respondent's Exhibit C).

[5] Respondent served, and Petitioner has responded to, multiple sets of Admission Requests and Document Requests in this proceeding. In addition, Petitioner has timely supplemented and amended some of its discovery responses on several occasions, as required under Fed.R.Civ.P., Rule 26(e).

in a comprehensive letter to Respondent's counsel on June 20, 2013. A copy of that letter is submitted herewith as **Exhibit 5.**

ARGUMENT

I. Respondent's Fourth Set Of Interrogatories Exceeded The Permissible Number of Interrogatories That Can Be Served Under 37 CFR §2.120(d)(1).

It is undisputed that the maximum number of interrogatories that can be served by a party to a Cancellation proceeding is seventy-five (75), counting their discrete subparts—unless the TTAB, upon motion, grants permission to exceed that number. 37 CFR §2.120(d)(1).[6] Upon being served with Respondent's "fourth set" of written interrogatories in this proceeding, Petitioner properly followed the procedure outlined in 37 CFR §2.120(d)(1) which required a timely General Objection to any set of interrogatories if the responding party believed that the number of inquiries exceeded the numerical limitation of 75 (counting discrete subparts). Thus, the initial issue before the TTAB concerning Respondent's fourth set of interrogatories and Petitioner's General Objection thereto is whether Respondent had, in fact, exceeded the limitations imposed under the aforesaid rule. That issue turns on whether the primary numbered interrogatories, as well as their discrete subparts (both numbered and unnumbered), exceeded 75 in total.

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[6] Under 37 CFR §2.120(d), "[a] motion for leave to serve additional interrogatories must be filed and granted prior to the service of the proposed additional interrogatories and must be accompanied by a copy of the interrogatories, if any, which have already been served by the moving party, and by a copy of the interrogatories proposed to be served" (emphasis added). In this case, Respondent did not follow that procedural approach, even though it was fully aware that Petitioner believed Respondent had already exceeded the numerical limits on interrogatories in this proceeding. A party's failure to seek such approval from the TTAB before serving an excessive number of interrogatories has been viewed as rendering any claim of good cause to be "unavailing". See, *Baron Phillippe De Rothschild S.A. v. S. Rothschild & Company, Inc.*, 16 U.S. P.Q.2d 1466 (TTAB, 1990).

Petitioner recognizes that the calculation of interrogatories, counting their discrete subparts, has proven to be a rather "inexact science" over the years. However, a number of general rules or guidelines have been articulated by both the TTAB and the federal courts that provide guidance in determining whether a particular interrogatory contains more than a single discrete inquiry. In attempting to consistently apply a formulae for calculating interrogatories, the courts have typically asked whether the second inquiry can stand alone (independent of the first inquiry). In other words, can the initial inquiry be answered fully without answering the second question?[7] The numerical limits for interrogatories cannot be avoided by resorting to the use of compound questions and conjunctive questions within an interrogatory. Likewise, interrogatories seeking information on more than one issue are counted separately (*e.g.*, "sales and advertising figures" or "adoption and use" of a mark). See, Calcagno, "Tips From The TTAB: Discovery Practice Under Trademark Rule 2.120(d)(1), 80 *TMR* 285 (1990), cited with approval in *Jan Bell Marketing, Inc. v. Centennial Jewelers, Inc.*, 19 U.S. P.Q.2d 1636 (TTAB, 1990).

As set forth more fully below, Petitioner believes that the numerical interrogatory limitations were plainly exceeded by Respondent in this case. Applying the above-noted guidelines for calculating the number of discrete inquiries being asked in interrogatories, the cumulative total interrogatories, counting their discrete subparts, approximated 90 in number. Respondent, prior to bringing its motion, made no argument that Petitioner's calculation was inaccurate and, in fact, it now makes no such argument in its motion.

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[7] The interrogatory limitations cannot, however, be avoided by resort to introducing the interrogatory with a broad inquiry followed by narrow unnumbered subparts. See, Trademark Trial and Appeal Board Manual of Procedure, §405.03(d).

(Respondent's First Set Of Interrogatories)

Respondent's first set of interrogatories contained a total of **33** interrogatories, counting their discrete subparts (both numbered and unnumbered). This calculation is based on the following:

Interrogatory No. 1 – This is a conjunctive inquiry that contains two discrete subparts (one relating to the facts/date of the formation of Petitioner and the other seeking information regarding the "business purpose" of Petitioner). Describing the "business purpose" of Petitioner is an inquiry that can be answered without responding to the initial subpart inquiry directed at the facts/date of the formation of Petitioner. The two inquiries introduce separate lines of inquiry and, as such, are discrete subparts.

Interrogatory No. 2 – This compound inquiry contains four discrete subparts (two pertaining to information relating to Petitioner's "Officers" and two directed at Petitioner's "Directors"). The information concerning Petitioner's "officers" is entirely separate and distinct from the information focusing on Petitioner's "directors" and the initial inquiry can be fully answered without resort to answering the subsequent inquiry.

Interrogatory Nos. 3 & 4 – Each contain single inquiries.

Interrogatory No. 5 – This conjunctive or compound inquiry contains at least four discrete subparts (seeking the identification of Petitioner's predecessor/licensee, the "responsible individuals" of Petitioner's predecessor/licensee, the directors of Petitioner's predecessor/licensee, and the officers of Petitioner's predecessor/licensee). Each of these subparts seeks information unrelated to the other subparts within the interrogatory and each can independently stand without the need to respond to other parts of the interrogatory.

Interrogatory Nos. 6 & 7 – Each contain single inquires.

Interrogatory No. 8 – This compound question contains two discrete subparts (one relating to information concerning usage of the ECONOMY mark by the Petitioner and the other directed at usage of the mark by others that "inure" to Petitioner). Neither subpart is subsumed within the other subpart; they stand independent of each other.

Interrogatory No. 9 –This compound inquiry contains at least four discrete subparts (one relating to the identity of the "business entity", one relating to the business purpose of that business entity, one relating to the identify (names/status) of the directors of the business entity, and one relating to the identity (names/status) of the officers of the business entity). This conjunctive interrogatory seeks separate and distinct information and the three subsequent subparts are not subsumed in the initial question asking Petitioner to identify the business entity.

Interrogatory Nos. 10 through 13 – Each contain single inquiries.

Interrogatory No. 14 – This inquiry is composed of conjunctive questions that contain two discrete subparts (one seeking the identity of Petitioner's employees, and the other seeking the identity of the employees of Petitioner's predecessor-in-interest). The first inquiry can certainly be completely responded to without answering the second inquiry (and vice versa). Thus, neither inquiry is subsumed within the other inquiry.

Interrogatory No. 15 – Contains a single inquiry.

Interrogatory No. 16 – This compound inquiry contains at least six discrete subparts (two separate inquiries (date of photographs and location of photographs) for each of the three numbered subparts. Asking Petitioner for the dates when particular photographs were created is an inquiry completely separate and distinct from then

asking for the locations depicted in each of those photographs. The second inquiry is not subsumed within the first inquiry; rather, it is an independent inquiry.

(Respondent's Second Set Of Interrogatories)

Respondent's second set of interrogatories contained a total of **12** interrogatories, counting their discrete subparts (both numbered and unnumbered). This calculation is based on the following:

Interrogatory Nos. 17 through 22 – Each contain a single inquiry.

Interrogatory No. 23 – Contains two numbered subparts.

Interrogatory No. 24 – Contains four discrete subparts (two numbered subparts, but each of those subparts contain two separate inquires because the date when one became of aware of a fact is entirely unrelated to "how" that person became aware of the fact).

(Respondent's Third Set Of Interrogatories)

Respondent's third set of interrogatories contained a total of **17** interrogatories, counting their discrete subparts (both numbered and unnumbered). This calculation is based on the following:

Interrogatory No. 25 – Contains **17** subparts because it requested Petitioner to "set forth the fact basis for each...denial" of a request set forth in Respondent's First Request For Admissions.[8] While Respondent improperly failed to submit the response

[8] While Petitioner explained the factual basis for each of the denials in 17 separate responses to the interrogatory, two additional admission requests were deemed inapplicable because Petitioner had objected to, rather than denied, the requests. Accordingly, Petitioner has <u>not</u> counted the "inapplicable" responses as separate interrogatory answers.

to this interrogatory (which would have allowed the TTAB to calculate the number of discrete subparts to the interrogatory), Petitioner submits herewith a copy of that response as **Exhibit 6.** It is well-settled that this type of "conjunctive question" interrogatory results in separate subparts for each required explanation of a denied admission request. See, for example: *Safeco of America v. Rawstron,* 181 F.R.D. 441, 445-446 (C.D. Cal. 1998).

(Respondent's Fourth Set Of Interrogatories)

Respondent's fourth set of interrogatories contained a total of **28** interrogatories, counting their discrete subparts (both numbered and unnumbered). This calculation is based on the following:

Interrogatory Nos. 26 through 43 – Each contain a single inquiry.

Interrogatory No. 45 – This compound inquiry contains at least three separate and discrete subparts (the request for annual expenses from 2009 through 2012, the identity of categories of products/services paid for by Petitioner, and the "type of recipient" of the paid advertising, including if it was a related company). Each of the subsequent two inquiries seek information (types of services and types of recipients) entirely unrelated to each other, as well as logically unrelated to the initial inquiry asking for the amounts of monetary expenses during a four-year period.

Interrogatory No. 46 – This conjunctive inquiry contains two separate and discrete inquiries (one pertaining to the date of printing of the advertising flyer and another pertaining to the total number of flyers printed). The number of copies of an advertisement that were printed is an inquiry that can be answered without answering

the printing date(s) (and vice versa). One inquiry directed at the creation of an advertisement is simply unrelated or subsumed in the other inquiry directed at the scope of potential distribution of that advertisement. Thus, the second subpart introduced a line of inquiry separate from the preceding subpart.

Interrogatory No. 47 – This conjunctive inquiry contains at least two separate and discrete inquiries (one pertaining to the date range of for the printing of an advertising flyer and the other requesting information on how the document was distributed by Petitioner). The date of printing for an advertisement is entirely unrelated to how the advertisement was then distributed. The two inquiries are independent and not subsumed in one another. Facts which pertain to the distribution of a document is a line of inquiry separate and logically distinct from the creation of a document and both inquires stand independent of each other.

Interrogatory No. 48 through 50 – Each contain a single inquiry.

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Each of the unnumbered, discrete subparts to Respondent's interrogatories must be counted as a separate interrogatory for the purposes of assessing compliance with the limitations imposed by 37 CFR §2.120(d)(1). To do otherwise would allow a party to avoid the purpose of the rule limiting interrogatories (which, at 75, is already quite liberal). In each example noted above involving an unnumbered, separate subpart of an interrogatory, Respondent sought information on a discrete issue or introduced an inquiry that was not subsumed within the preceding inquiry. In short, this approach introduced subsequent lines of inquiry that were separate from the portion of the

interrogatory that preceded it. Each unnumbered subpart could be answered fully without responding to the other subpart, thereby demonstrating that each subpart could "stand alone" and resulted in an independent inquiry.

In view of the foregoing, Petitioner submits that Respondent, through the use of compound or conjunctive questions, has exceeded the permissible number of interrogatories, counting their discrete subparts, by at least 15 inquiries. Thus, Petitioner's General Objection to the final set of interrogatories was, and is, proper.

II. Respondent Has Not Demonstrated Good Cause To Warrant Relief From The Numerical Limits Imposed By 37 CFR §2.120(d)(1).

Petitioner certainly recognizes that the TTAB has the authority to grant a party leave to serve more than 75 interrogatories in a proceeding before it. However, the Board has always required a showing of "good cause" in order to grant such relief from the limits imposed by 37 CFR §2.120(d)(1). This is particularly true where, as here, the requesting party has not sought leave to serve additional interrogatories before actually serving them on its adversary. See, Trademark Trial and Appeal Board Manual of Procedure, §405.03(a) ("A motion for leave to serve additional interrogatories must be filed and granted prior to the service of the proposed additional interrogatories..."). As noted by the TTAB in *Baron Phillippe De Rothschild S.A., supra,* "the good cause requirement of Trademark Rule 2.120(d)(1) must necessarily be interpreted in a restrictive manner to effectuate the new rule's purpose of curtailing the number of interrogatories permitted to be served in a proceeding." In the present case, Petitioner

submits that Respondent has certainly not met its burden of establishing "good cause" to warrant the relief it now seeks from 37 CFR §2.120(d)(1).

Respondent's contention that it requires more interrogatories because it has been confused and misled by Petitioner's pleading, initial disclosures, and discovery responses is, at best, disingenuous. Respondent's complaints about Petitioner's pleading is particularly suspect because Respondent failed to move for a more definite statement, a motion that could have been made under Fed.R.Civ.P. Rule 12(e).[9]

Discovery in this case opened on July 11, 2012. Respondent waited over five months before it served its first set of discovery requests on December 18, 2012. Respondent's inordinate delay in pursuing any discovery following the pleadings in this case is left completely unexplained by Respondent and is certainly "curious" in light of arguments that it now advances concerning the vague nature of the Petition For Cancellation (and Petitioner's Initial Disclosure Statement). Also entirely unexplained is why Respondent did not pursue any discovery depositions in this case if it truly felt that it was being provided with vague or misleading discovery responses.

Respondent, referring to Petitioner's predecessor in interest, argues that following the pleadings, "Petitioner's Initial Disclosure statement did very little to clear the fog." Motion, at p. 8. Under the federal rules, however, a party is required to identify the "names of witnesses"—not companies. In its Initial Disclosure Statement, Petitioner made the following witness identification in connection with its predecessor:

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[9] It is noteworthy that not only did Respondent fail to file a Rule 12(e) motion directed at Petitioner's pleading, it did not question or voice any concerns about the specificity of the pleading during the August 9, 2012 telephone conference under Rule 26 with the Interlocutory Attorney in this case, even though the parties' respective pleadings was a topic of discussion during that conference.

Bob Martyn	7256 Sepulveda Blvd. Van Nuys, CA 818-901-1828 (Last Known Address)	Use of the mark ECONOMY RENT-A-CAR mark in the State of California and transfer of said mark

Petitioner also made the following identification of documents:

Copies of Yellow Pages advertising materials (and documents related thereto) used by Petitioner's predecessor to promote the ECONOMY RENT-A-CAR mark in California;
Assignment and transfer documents conveying rights in the ECONOMY RENT-A-CAR mark to Petitioner's related companies and licensing mark to Petitioner;

When Respondent, four months later, finally got around to seeking written discovery in this case, Petitioner promptly provided it with copies of the above-noted documents and further identified its corporate predecessor (including the relationship between Bob Martyn and the corporate predecessor of Petitioner). In response to Respondent's first set of interrogatories, Petitioner made the following disclosures:

Interrogatory No. 4

Identify the "predecessor-in-interest" in paragraph 7 of Petitioner's Amended Petition for Cancellation in the above-styled proceeding, through which Petitioner claims to have established priority of use for the unregistered word mark ECONOMY RENT-A-CAR.

Response To Interrogatory No. 4:

UDBC, Inc., a California corporation doing business at 7254 Sepulveda Blvd., Van Nuys, CA 91405.

Interrogatory No. 5

Identify the "predecessor-in-interest" and the "licensee", including names and addresses of the responsible individuals, officers and directors, in paragraph 2 of Petitioner's Amended Petition for Cancellation in the above-styled proceeding, through which Petitioner claims to have

been "rendering its vehicle rental services in California since at least as early as December of 1993."

Response To Interrogatory No. 5:

UDBC, Inc., a California corporation doing business at 7254 Sepulveda Blvd., Van Nuys, CA 91405. On information and belief, Peter Thomas is the President (and Director) and Bob Martyn is the Secretary/Treasurer (and Director) of that corporation. Each person's business address is at the above-noted location.

Interrogatory No. 6

Describe each transfer of any rights in Petitioner's alleged trademark ECONOMY RENT-A-CAR, identifying the date and the parties and the scope of rights transferred, from 1992 to the present, including any transfer of rights involving third parties.

Response To Interrogatory No. 6:

In lieu of a written description, Petitioner has produced Document Nos. P-56 through P-81, as well as P-123 through P-128, in its response to Registrant's document requests. The aforesaid documents provide the information sought by Registrant in this interrogatory.

Thus, Respondent was fully and completely informed of the predecessor company named in the pleadings, the identity of Bob Martyn (named in the Initial Disclosure Statement), the relationship of Mr. Martyn to the predecessor company, and was provided with the documents that fully demonstrated the transfer of trademark rights from that company to the Petitioner. For Respondent to now argue that it was

somehow left confused or misled by Petitioner regarding the latter's predecessor is nothing short of frivolous.[10]

As noted *supra,* Respondent must demonstrate "good cause" for leave to exceed the numerical limits on interrogatories imposed under 37 CFR §2.120. Moreover, a motion to seek such leave from the TTAB must be filed before, not after, an excessive number of interrogatories have been served in a proceeding. Respondent conduct in this case fails on both counts.

III. Respondent Has Not Met Its Burden Of Demonstrating Why Petitioner Should Be Compelled To Provide Information Or Documents That Are Not In Its Possession, Custody Or Control.[11]

Respondent argues that Petitioner should be compelled to provide information and documents that are not in the possession, custody and/or control of Petitioner. Respondent cites no legal basis for its demand; instead, it muses that since Petitioner produced other information and documents concerning its predecessor's use of the ECONOMY RENT A CAR mark, it must be in possession of the financial and booking information requested in Respondent's Interrogatory No. 18 and Document Request No. 36. See, Motion at p. 10.

It is well-settled that a court cannot compel a party to produce documents (or information) which is not in its possession, custody and/or control. Respondent makes no claim (and could make no such claim) that Petitioner actually possesses the

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[10] Respondent also claims it was misled about the "parental" relationship of Proveedores y Soluciones DAC S.A. to Petitioner. Respondent fails to explain how any such a relationship is relevant to any claim in this proceeding. In fact, there is no such relevancy.

[11] Rule 34(a)(1) expressly states that a party may only serve on the other party a request for documents that are within the latter's "possession, custody, or control".

requested data or documents, or that Petitioner has the legal right to demand such information and documents from a separate company not a party to this proceeding.[12] Respondent's musings as to whether Petitioner could obtain the information or documents is completely insufficient to meet Respondent's burden in that regard.[13] As one court has noted: "Control must be firmly placed in reality [citations omitted], not in an esoteric concept such as 'inherent relationship'." *U.S. v. International Union of Petroleum And Industrial Workers, AFL-CIO,* 870 F.2d 1450, 1453-54 (9th Cir. 1989); see also, *Harris v. Koenig,* 271 F.R.D. 356, 371 (D.D.C., 2010) ("Lack of evidence showing that a producing party is in fact in possession of a document is grounds to deny a motion to compel"); *Bethea v. Comcast,* 218 F.R.D. 328 (D.D.C., 2003) (a party's mere suspicion that additional documents exist does not justify a motion to compel).

While Petitioner has itself requested the documents and information from UDBC, Inc., those requests have not been fulfilled.[14] Petitioner simply had (and has) no legal authority to demand the documents (assuming, without admitting, that the archive documents even still exist). This does not, of course, mean that Respondent was left without any remedy to obtain the documents and information it desired. Respondent

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12 Control has been defined as the legal right to obtain documents upon demand. See, *Searock v. Stripling,* 736 F.2d 650, 653 (11th Cir. 1984). See, *In re Citric Acid Litigation 7-Up Bottling Co. of Jasper Inc.,* 191 F.3d 1090, 1107-08 (9th Cir. 1999).

13 Respondent has the burden of demonstrating that Petitioner has possession, custody or control over the documents and data requested in discovery. See, *Norman v. Young,* 422 F.2d 470, 472-73 (10th Cir. 1970); See also, *Tiffany (NJ) LLC v. Andrew,* 276 F.R.D. 143, 148 (S.D.N.Y. 2011).

14 Respondent was clearly advised of this fact by way of Petitioner's correspondence with Respondent on June 24, 2013. In that email correspondence, Respondent's counsel was advised by Petitioner's attorney as follows: "In determining whether you wish to file a motion to compel supplemental answers to Interrogatory 18 and Document Request 36, I am advising you that this information and documents were sought by me from UDBC on at least three prior occasions. That information was not received (at least as of this date) and is, therefore, not readily available to the Petitioner. Thus, the information and documents are most certainly not in our possession, custody or control of the Petitioner."

could have served a subpoena *duces tecum* on UDBC, Inc., but chose not to do so. Respondent could have taken the discovery deposition of Bob Martyn, but chose not to do so.

CONCLUSION

Respondent, like all other litigants seeking to resolve disputes before the TTAB, is afforded the right to pursue discovery through written interrogatories. Like all other litigants, however, Respondent is limited in its pursuit of that form of discovery to seventy-five (75) interrogatories, counting their discrete subparts (regardless of whether they are separately numbered or unnumbered). That limitation is fixed, unless the parties stipulate otherwise or the TTAB grants leave to exceed those limits. Here, Respondent rejected Petitioner's several offers to stipulate to an increase in interrogatories because it did not want Petitioner to be given the same number of interrogatories as given to Respondent. After rejecting the "stipulation approach", Respondent then ignored the rule that before serving an excessive number of interrogatories, it must first seek leave from the TTAB to do so. Then, in its belated request seeking such leave to serve the excessive interrogatories, Respondent completely failed to demonstrate any "good cause" for its request.

Adding to the meritless nature of Respondent's present discovery motion is its demand that Petitioner somehow obtain and convey information and documents that are simply not within its possession, custody or control—a fact that was repeatedly brought to Respondent's attention on several occasions.

Respondent's motion simply has no factual merit or legal support and should be denied accordingly.

ECONOMY RENT-A-CAR, INC.

Date: July 11, 2013

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **PETITIONER ECONOMY RENT-A-CAR, INC.'S OPPOSITION TO RESPONDENT'S COMBINED MOTION TO COMPEL DISCOVERY AND LEAVE TO SERVE ADDITIONAL INTERROGATORIES** was served this 11th day of July, 2013, upon Respondent's counsel of record, *via* fax transmission and first class mail, postage prepaid, as identified below:

John Motteli
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Samuel D. Littlepage, Esquire
Counsel for Petitioner

PETITIONER'S EXHIBIT 1

Samuel D. Littlepage

From:	Sharon Gobat <gobat@davincipartners.com>
Sent:	Friday, April 26, 2013 9:30 AM
To:	Samuel D. Littlepage
Cc:	John Moetteli; Nicole M. Meyer
Subject:	Economy Rent-A-Car: additional interrogatories

Dear Samuel:

We are concerned that the interrogatories we are preparing to serve on behalf of our client will result again in your client's general objection that they exceed the limit of 75.

Please provide me with:
(1) The total number of interrogatories you believe we have served to date on behalf of Registrant; and
(2) an explanation of how you arrived at that number.

Since we think our client's fourth set of interrogatories will put us over the limit according to you, we plan to file a Motion for Leave to Serve Additional Interrogatories. Your response to the above questions is urgently needed so that we can properly explain our Motion to the Board.

Thank you for your prompt attention to the above questions.

Yours sincerely,

Sharon Gobat

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devices, software, methods, computer systems, electro-mechanical, electronics, optics, applied physics, micro-technology, and patent and trademark filing strategy.

PETITIONER'S EXHIBIT 2

Samuel D. Littlepage

From:	Samuel D. Littlepage
Sent:	Friday, April 26, 2013 9:43 AM
To:	Sharon Gobat
Cc:	John Moetteli (moetteli@davincipartners.com); Nicole Meyer (nmeyer@dickinson-wright.com)
Subject:	RE: Economy Rent-A-Car: additional interrogatories

Sure. An alternative here would be to simply agree that each party may serve "X" number of interrogatories (counting subparts) before the discovery deadline date.

Samuel D. Littlepage, Esq.
Dickinson Wright PLLC
International Square Bldg.
1875 Eye Street, N.W., Suite 1200
Washington, D.C. 20006

Tel: 202-659-6920
Fax: 202-659-1559

From: Sharon Gobat [mailto:gobat@davincipartners.com]
Sent: Friday, April 26, 2013 9:41 AM
To: Samuel D. Littlepage
Cc: John Moetteli; Nicole M. Meyer
Subject: Re: Economy Rent-A-Car: additional interrogatories

Dear Samuel:

Yes, we can provide you with the same information, but not until Monday. I hope that will be acceptable.

Sincerely,

Sharon Gobat
Da Vinci Partners LLC

On 26 Apr 2013, at 15:33, "Samuel D. Littlepage" <SLittlepage@dickinson-wright.com> wrote:

Can you provide me with the same information (we may wish to serve a final set of interrogatories ourselves)?

Samuel D. Littlepage, Esq.
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Washington, D.C. 20006

Tel: 202-659-6920
Fax: 202-659-1559

PETITIONER'S EXHIBIT 3

Samuel D. Littlepage

From: Sharon Gobat <gobat@davincipartners.com>
Sent: Friday, April 26, 2013 9:52 AM
To: Samuel D. Littlepage
Cc: John Moetteli; Nicole M. Meyer
Subject: Re: Economy Rent-A-Car: additional interrogatories

Dear Samuel:

Although I appreciate your suggestion, that alternative isn't acceptable for us. So let's exchange this information no later than Monday.

Sincerely,

Sharon Gobat
Da Vinci Partners LLC

On 26 Apr 2013, at 15:43, "Samuel D. Littlepage" <SLittlepage@dickinson-wright.com> wrote:

Sure. An alternative here would be to simply agree that each party may serve "X" number of interrogatories (counting subparts) before the discovery deadline date.

Samuel D. Littlepage, Esq.
Dickinson Wright PLLC
International Square Bldg.
1875 Eye Street, N.W., Suite 1200
Washington, D.C. 20006

Tel: 202-659-6920
Fax: 202-659-1559

From: Sharon Gobat [mailto:gobat@davincipartners.com]
Sent: Friday, April 26, 2013 9:41 AM
To: Samuel D. Littlepage
Cc: John Moetteli; Nicole M. Meyer
Subject: Re: Economy Rent-A-Car: additional interrogatories

Dear Samuel:

Yes, we can provide you with the same information, but not until Monday. I hope that will be acceptable.

Sincerely,

Sharon Gobat
Da Vinci Partners LLC

PETITIONER'S EXHIBIT 4

Samuel D. Littlepage

From: Samuel D. Littlepage
Sent: Monday, April 29, 2013 11:18 AM
To: Sharon Gobat
Cc: John Moetteli; Nicole M. Meyer
Subject: RE: Economy Rent-A-Car: additional interrogatories

ProfileOnSend: 1

Sharon:

I believe you have served a total of 76 interrogatories (counting subparts) on behalf of your case. Those interrogatories were set forth in three sets of discovery (disregarding the initial "withd interrogatories) and, by my calculation, were as follows: First set=45 interrogatories, counting sub Set=12 interrogatories, counting subparts; Third Set=19 interrogatory subparts. My calculations cc total interrogatory subparts followed the same general approach that I already outlined to you and J email of December 10, 2012 (particularly with regard to compound questions and inquiries seeking discrete information). I believe where you and I differ on the interrogatory "subparts" is in countin interrogatory that asks for the factual basis for the denial of admission requests. I believe that each counts as an interrogatory subpart.

Because you have exhausted the permissible number of interrogatories you may serve in thi will need to convince the TTAB that more interrogatories are necessary. I am quite doubtful that y demonstrate sufficient good cause to support a motion in that regard. Nevertheless, in order to avo practice, I again offer to stipulate that each party can serve a limited number of additional interroga a set date (number and date to be agreed upon). You rejected that approach last week, but I urge y reconsider your position. I believe the TTAB will not look favorably on any request by you to exc number of interrogatories when, at the same time, you refuse to treat my client equally by allowing number of excess interrogatories.

If you wish to pursue the "stipulation approach", I propose allowing each party 10 addition interrogatories (counting subparts) to be served within the next 10 days. I look forward to your res

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PETITIONER'S EXHIBIT 5

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Samuel D. Littlepage
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(202) 659-6920

June 20, 2013

Ms. Sharon Gobat
Da Vinci Partners LLC
St. Leonhardstrasse 4
CH-9000 St. Gallen
Switzerland

Re: ***Economy Rent-A-Car Inc. v. Emmanouil Kokologiannis and Sons, Societe Anonyme of Trade, Hotels and Tourism S.A.***
Our Reference: 39172-0039

Dear Sharon:

The following is in response to your undated letter received by me on June 19, 2013 relating to discovery responses by the Petitioner in the above-noted proceeding.

Interrogatories

Our position concerning Respondent's additional Interrogatories was set forth in my email correspondence of April 29, 2013 (which, of course, preceded your client's Fourth Set of an additional 24 separately-numbered interrogatories, some of which contained compound inquiries). While we may have had a legitimate disagreement concerning the counting of 6 or 7 subparts to your prior interrogatories, the subsequent additional interrogatories would certainly have placed the total number well beyond that which is permissible under the TTAB's rules of practice.

What I find particularly troublesome is the fact that you rejected my offer to allow each side to serve a limited number of additional interrogatories in this case. Thus, it seems that you have created a situation inviting a discovery motion—one that could have been avoided had you agreed to my earlier proposal. Compounding that unfortunate approach, you did not bother to seek leave from the TTAB before you served the additional Fourth Set of interrogatories. Accordingly, I do not think the TTAB will now look with favor upon your motion or any request to serve more interrogatories. Therefore, we will oppose any motion you file concerning this matter.

With regard to your complaint about the absence of certain financial information (your Interrogatory Nos. 18 and 27, as well as Document Request 36), the requested information is in the possession of a third party—namely, Economy Rent-A-Car, Inc. and Bob Martyn. The Petitioner was not, and is not, in possession of that information or

those documents (despite efforts to obtain the same). Your client had a year, however, in which to take the deposition discovery (and subpoena those documents) from that California company—yet chose not to do so. Under those circumstances, I do not believe a motion to compel information/documents not in the Petitioner's possession or under its control will be granted by the TTAB.

Document Requests

With respect to Document Request No. 31, we believe the response is nonevasive and requires no further explanation. The document request sought documents that evidence "efforts by UDBC" to either maintain or strengthen the association of its mark with UDBC. Every advertisement placed or made by UDBC concerning the ECONOMY RENT A CAR mark amounted to an effort to "associate" the company with the mark and you are already in possession of those documents. We, of course, also maintain our objection to that ambiguous discovery request as well.

With regard of Document Request No. 36, I have already explained our position above concerning documents that are neither in the possession of the Petitioner, nor under its control.

In response to your comments concerning Document Request No. 39, I believe the Petitioner's response to that inquiry was, and is, complete. Moreover, you are as capable as I am in identifying the rental agreements already provided to you.

With regard to the reference to Document Nos. 333 and 334 (Allied Rental Car Agreements), you are correct in noting that they were not responsive to certain requests that were directed at the activities of only UDBC. You should disregard the references to Document Nos. 333-334 and this statement corrects the erroneous citation of those two pages in the responses to your Document Request Nos. 31, 32, 33 and 40. I have also provided you with a formal amended Response to you as well (see attached).

Document No. 345 is believed to be responsive to Document Request No. 33 because it is part of an Internet advertisement displaying UDBC's ECONOMY RENT-A-CAR mark in 2009.

We will amend our responses to Document Request Nos. 39 and 40 (see attached).

Admission Requests

In response to your initial comments regarding Admission Request Nos. 67, 68, 69 and 70, Petitioner believes that its response to Document Request 40 provided

Respondent with documents demonstrating advertising during the post-2004 period noted in the admission requests. As noted above, Petitioner is amending its response to Document Request No. 40.

Concerning your comments regarding Petitioner's response to Admission Request Nos. 68, 69 and 70, Petitioner stands behind its responses and does not intend to amend them. The interrogatories you refer to (46, 47 and 48) were not proper when served and I am confident that the TTAB will agree with that position on my part.

Conclusion

Finally, if you intend to file the discovery motion, I request that you do so this week. As you are aware, I have been working hard in an attempt to fit the Petitioner's Testimony Depositions into the 4 dates that you requested. That has consumed quite a bit of time and effort, not only on my part, but on the part of at least four witnesses located in four different parts of the country. You have been aware of those efforts on my part for weeks, yet sat back in silence while we undertook actions to satisfy the personal work and travel schedules of both you and John. If that effort is now to prove a waste of time due to your threatened discovery motion, I believe that fairness dictates that you so inform me promptly in order that I can, in turn, inform the potential witnesses (and cancel the various hotels and court reporters that I have reserved over the past week).

Very truly yours,

Samuel D. Littlepage

cc: Mr. John Moetteli

DC 39172-39 227388v1

PETITIONER'S EXHIBIT 6

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

ECONOMY RENT-A-CAR, INC. Petitioner, v. EMMANOUIL KOKOLOGIANNIS AND SONS, SOCIETE ANONYME OF TRADE, HOTELS AND TOURISM S.A. Respondent.	Cancellation No. 92055558 Registration No. 3256667

PETITIONER ECONOMY RENT-A-CAR, INC.'S RESPONSE TO RESPONDENT'S THIRD SET OF WRITTEN INTERROGATORIES

Petitioner Economy Rent-A-Car, Inc. hereby sets forth the following response to "Respondent's Third Set Of Written Interrogatories" in the above-styled action and states as follows:

GENERAL OBJECTIONS

1. Petitioner objects to Respondent's interrogatories to the extent that they purport to request information protected from disclosure by any privilege, including the attorney-client privilege and the attorney work product privilege.

2. Petitioner objects to any use in the interrogatories, either directly or indirectly, of the phrase "person" or "persons", or any other term or phrase intended to include firms, associations, corporations, partnerships, employees, consultants, experts,

investigators, insurers or attorneys, the identities of which may not be known to Petitioner.

3. Petitioner objects to those interrogatories wherein Respondent seeks information and the identification of documents which are not within the possession, custody, or control of, or otherwise reasonably available to, Petitioner.

4 Petitioner objects to the interrogatories to the extent that they may attempt to impose on Petitioner a continuing duty to respond that is in any way inconsistent with the Federal Rules of Civil Procedure (which have been adopted by the Trademark Trial And Appeal Board).

5. Petitioner objects to the interrogatories to the extent that Respondent seeks information or the identification of documents which are irrelevant to the subject matter of this Cancellation proceeding and which are not reasonably calculated to lead to the discovery of admissible evidence.

6. Petitioner objects to the definition of "Petitioner" as being unduly narrow to the extent that it seeks to exclude rights obtained by Petitioner from its predecessor in interest.

7. Petitioner objects to the definition of the term "related companies" as being unduly broad and burdensome. Petitioner will supply information concerning the identification of "related companies" as that term is defined in Section 45 of the Lanham Act, but will not provide information that might be held by those companies and not reasonably available to Petitioner.

8. Petitioner objects to the "Definitions" and "Instructions" set forth in Respondent's second set of written interrogatories to the extent that such definitions

and instructions are broader than those set forth in Civil L.R. 26.3. In addition, Petitioner will respond to the following discovery requests only to the extent that the requested information is within its custody, control or possession, or is otherwise available to it.

9. Petitioner objects to the definitions provided by Respondent for use in responding to the latter's discovery requests in that said definitions attempt to modify what terms mean under commonly accepted English language interpretations. Moreover, the definitions render the discovery requests unduly burdensome. Petitioner will, therefore, interpret the words of the discovery requests consistent with their plain meaning in the English language.

10. Petitioner objects to any request for the identification of "all documents" on the grounds that they violate the spirit of the Federal Rules of Civil Procedure. FED.R.CIV.P. permits the discovery of "designated" documents, rather than a general inspection of an adversary's records (i.e., a fishing expedition). Moreover, such requests seeking information about "all documents" is unduly general and vague, thereby also being needlessly oppressive and burdensome. Without waiving this objection, Applicants will respond to those requests to the extent reasonably possible.

11. Petitioner objects to the requests to the extent that they seek discovery of information or documents regarding the mental impressions or opinions of Petitioner's legal counsel, or materials prepared by or for Petitioner or their representatives, in anticipation of litigation, on the grounds that Respondent is not entitled to discovery of such work product privileged information under Rule 26 of the Federal Rules of Civil Procedure.

INTERROGATORY RESPONSES

Interrogatory No. 25

If Petitioner denies, in whole or in part, any of the admission requests in Respondent's First Request for Admissions in this proceeding, set forth the fact basis for each such denial.

Responses To Interrogatory No. 25:

Admission Request No. 1:

The admission of this request was qualified because Petitioner receives from its licensees 33% to 35% of those revenues generated by the rental of vehicles under Petitioner's trademarks.

Admission Request No. 2:

This admission of this request was denied or qualified because Petitioner's licensees enter contracts with customers and Petitioner itself is obligated in various ways under those contracts.

Admission Request No. 3:

This admission request was denied because Petitioner is, in fact, "accountable" to rental customers of its licensees and has, in fact, made payments to such customers if they are dissatisfied with the quality of services rendered under the Petitioner's mark (or, alternatively, it has instructed the licensees to make such payments).

Admission Request No. 4:

This request was denied because such documentary evidence not only exists, but it has previously been provided to Registrant. See, for example, P-45 through P-50.

Admission Request No. 5:

The admission of this request was qualified because Petitioner's authorized licensees do, in fact, rent or lease their physical facilities in connection with Petitioner's Mark and the rental of vehicles under that mark.

Admission Request No. 6:

The admission of this request was qualified because Petitioner's authorized licensees do make such payments to Petitioner for the right to display Petitioner's Mark on their physical premises.

Admission Request No. 7:

The admission of this request was qualified because Petitioner's authorized licensees own such vehicles which they rent to customers under Petitioner's Mark.

Admission Request No. 8:

This request was denied because customers are, in fact, "exposed" to Petitioner's Mark following the booking of vehicles. Such exposure is, for example, made by way of signage that is present at various locations (and samples of such documents have been previously provided to Registrant). In addition, Petitioner's Mark

is also found on rental car receipts provided to customers (samples of which are being produced in response to Registrant's "Second Request For Production Of Documents And Things").

Admission Request No. 9:

This request was denied because it is simply wrong. Customers can cancel a rental by directly contacting Petitioner (or its affiliates/licensees).

Admission Request No. 10:

This admission request was denied because Petitioner has "invited" customers to contact it concerning problems or complaints (reference the "Contact Us" page on the reservations system web site, a copy of which was previously provided to Registrant).

Admission Request No. 11:

This admission request was denied because it is wrong. Petitioner's Mark is displayed on signage (see, for example, P-121 and P-122 previously produced to Registrant). Samples of Petitioner's Mark, as displayed on its Licensee's customer invoices or receipts are also being produced in response to Registrant's "Second Request For Production Of Documents And Things".

Admission Request No. 12:

Not applicable in light of Petitioner's objection.

Admission Request No. 13:

Not applicable in light of Petitioner's objection.

Admission Request No. 14

This admission request was denied because such documentary evidence exists and had been previously produced by Petitioner (see P-111).

Admission Request No. 15:

This admission request was denied because such documentary evidence exists and had been previously produced by Petitioner (see P-111).

Admission Request No. 16:

This admission request was denied because state common law mark for the ECONOMY RENT-A-CAR mark exists (see, for example, the mark displayed in P-121 and P-122).

Admission Request No. 17:

This admission request was denied because Petitioner, through its affiliates/licensees, is "in the business" of renting vehicles under Petitioner's Mark and trade name.

Admission Request No. 18:

The admission of this request was qualified because ample documentary evidence exists as to rental transactions between Petitioner's numerous licensees and customers outside of California.

Admission Request No. 19:

This request was denied because Petitioner's California state registration extends Petitioner's rights in its mark throughout the entire state of California.

* * * * *

All objections to any of the foregoing interrogatories were made on behalf of Petitioner by its undersigned counsel.

Samuel D. Littlepage, Esquire
DICKINSON WRIGHT PLLC
International Square Building
1875 Eye Street, N.W., Suite 1200
Washington, D.C. 20006-5420
Tel: (202) 457-0160
Fax: (202) 659-1550

VERIFICATION

I, Alejandro L. Muniz, declare under penalty of perjury that I have read the foregoing ***Petitioner, Economy Rent-A-Car Inc.'s Response To Respondents' Third Set Of Written Interrogatories*** and know the contents thereof to be true to my personal knowledge or upon information and belief after due inquiry. I hereby declare and verify, under penalty of perjury and in accordance with 28 U.S.C. §1746, that the foregoing is true and correct.

Date: March 25, 2013 By: _____
Alejandro Muniz

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **PETITIONER ECONOMY RENT-A-CAR, INC.'S RESPONSE TO RESPONDENT'S THIRD SET OF WRITTEN INTERROGATORIES** was served this 28th day of March, 2013, upon Respondent's counsel of record, *via* fax transmission and first class mail, postage prepaid, as identified below:

John Mottell
Sharon Gobat
Da Vinci Partners LLC
St. Leonhardstrasse 4
CH-9000 St. Gallen
Switzerland
Fax: +41 71 230 1001

Samuel D. Littlepage, Esquire
Counsel for Petitioner

DC 39172-39 221338v1